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ROMAN LAW AND MOHAMMEDAN JURISPRUDENCE

I.

A COMPARISON of the Roman law with Mohammedan jurisprudence, is a task not easy to accomplish, nor can an essay on that theme be made comprehensive enough to embrace all the ramifications of both legal systems. The object, therefore, of the present article, is to make only a cursory comparison of them, and to demonstrate their similarity in more than one point, showing the close analogy existing between them, and the influence that the laws of Rome exercised in the development of the Islamic legislation.

As in the early days of Rome, law and religion had a close connection with each other, so in the countries professing the faith of Mohammed, theology and jurisprudence were firmly linked together. The Arabs, who were the first converts to that religion, accepted the "divine messages," not only as a new faith, prescribing their duties to God, but also as a law enjoining upon them adherence to certain rules in their relations to man. The "Prophet" was of their race, and his opinions and commandments helped them to fix their beliefs and regulate their conduct.¹

If we examine the sources from which both legislations sprang, we see that the Mohammedans claim that their whole system of jurisprudence is founded on the "revelations" made in the "Holy Book," and in the sayings and actions of their "Prophet;" while the Romans speak always with reverence of the laws borrowed from Greece in the early days of their history, from which they believe the jurists drew the necessary material in framing the famous XII Tables.² Whilst the *Leges Curiatae*, attributed to Romulus and his successors and said to have been subsequently collected by Sextus Papirius, under the name of Jus Civile Papirianum, formed the laws of the regal period;³ the Mohammedans, during all epochs, had the Koran for their guidance, or at least, they claim that they were inspired only by the teachings of the Arabian Prophet in shaping their legal system. They had nothing similar to the XII Tables,

¹ See Ibn Khaldoun, traduction française, Vol. 19, p. 453.

² In token of esteem and gratitude for the services rendered by the Greek jurist Hermodorus in the preparation of the XII Tables the Romans erected his statue in the *Comitium*. (See Cug. Les Institutions Juridiques des Romains, Vol. I, p. 132.)

They also erected a statue to Pythagoras, for having been inspired by his teachings in the framing of their laws. Ib. Cug., p. 135.

See also Voigt XII Tafeln, Vol. I, p. 11. δοκεῖ δ' οὗτος ὁ ἀνὴρ νόμους τινὰς Ῥωμαίοις συγγράψαι. Strabo, XIV, 1, 25.

³ Cf. Ortolan, Explications des Institutes, Vol. I, p. 71. Also Voigt, Roemische Rechtsgeschichte, Vol. I, p. 17.

which were the very foundations upon which, in the course of many centuries, the jurists of the Roman Republic and particularly those of the Empire built up and subsequently developed a legal science unparalleled in the history of the world, the influence and tincture of Hellenic philosophy, contributing on its side in a large measure to mould the form of the law and bring it more into harmony with the needs of civilized communities.

But Mohammedan law rests on an entirely different basis. There were neither *curies* nor *curiatae*, nor any assembly with power to enact laws for the "faithful," with the exception of occasional meetings of jurists, whose opinions may have had a decisive influence in the interpretation of the Koranic law.⁴ Mohammedan jurisprudence is purely the outcome of theocracy, or at least, it is supposed to be so. It is God, according to the Mussulman belief, that gave their laws, through Mohammed the "Prophet;" consequently, it was to the "Holy Book," i. e., the Koran, that the "faithful" had to look for guidance and inspiration in all their affairs, be they temporal or spiritual. They were, and still are, firmly convinced that nothing better than the Koran could have preexisted, and therefore, anything said or done, either in worldly or spiritual affairs, prior to its publication, could be relegated to oblivion. In the future, the "faithful" had to rely on the precepts of the "divine messages" alone.⁵

This belief, that the Koran is of divine origin, was not, however, shared at all times by all the Mussulmans. Thus, during the first century of the Hegira (i. e. from 622 A. D.), a religious sect known by the name of the "Mutazilites," though Mohammedans, proclaimed that the Koran had a human and not a divine source.⁶ At a later epoch, i. e., in the year 212 of the Hegira (about 935 A. D.), during the reign of the Abassides, the then Khalif Mamoun, being a convert to that belief, promulgated an edict in which he upheld this religious view.⁷

Although the Mohammedans consider the Koran the principal source of their jurisprudence, they recognize as secondary sources

⁴ Savvas Pasha, *Etude sur la Theorie du Droit Musulman*, Première Partie, p. 34.

Ebou Hanifé, the foremost Mohammedan jurist, convoked very often persons versed in law into special assemblies, in which legal questions were discussed. The sittings of these assemblies lasted sometimes sixty days, and their decisions were inscribed in the Mohammedan Corpus Juris. Savvas Pasha, *op. cit.*, p. 113.

⁵ Koran, Ch. v, verses 52-54 and Ch. xvi, verses 66-91, quoted by Tornau, *Droit Musulman Schiite*, Traduit par Eschbach, p. 11, note 1.

⁶ Tornau, *op. cit.* p. 11, note 3; Wherry, *Commentary on the Koran*, Vol. I, p. 242-244. Also Von Kremer, *Culturgeschichte des orienten unter den Kalifen*, Vol. II, p. 413.

⁷ See G. Weil, *Geschichte der Kalifen*, Vol. II, p. 262.

In the subsequent reign of Khalif Mutassim, this belief being discarded by the "Commander of the Faithful," the famous jurist Hanbal was publicly flogged on account of his heresy. Weil, *op. cit.*, p. 262. See also Wherry, *op. cit.*, p. 240.

the dicta or sayings of the "Prophet" and the account of his actions which has been religiously preserved by his disciples. The interpretations made by various theologians of the precepts contained in the "Holy Book" and of the sayings and doings of Mohammed resulted in the formation of many religious sects, and at a later epoch, the "faithful" accepted the opinions of four theologian jurists which up to this day form the basis of their religion and law⁸ These jurists are Hanefi, Malik, Thafei, and Hanbal, who flourished in the second and third century of the Hegira; i. e., during the eighth and ninth centuries of the Christian Era.⁹

From the works of these commentators on the Koran and the dicta and actions of the "Prophet," subsequent jurists formed the "Universal Code" of the Mussulmans. The Universal Code is supposed to have as its sources: (1) The Koran. (2) The Dicta or sayings and actions of Mohammed.¹⁰ (3) The opinions and decisions of his first lieutenants, those of his disciples, and of the first four Khaliphs on questions of theology, law, and government, known under the name of Idjmay Oumett, i. e., the assembly of the chiefs. (4) The opinions and decisions of theologians and jurists of the first centuries of the Mohammedan era. These are called "Kyass;" namely, opinions or decisions by analogy or comparison. In fact the last is the sequel to the three preceding sources. As the first two sources are original, they are called "Katiyé;" namely, fundamental¹¹ or Asl-ul-asl; i. e., source of sources,¹² while the last two sources are termed "Itztihadié; namely, derivative or secondary.¹³

An example of law by analogy is the prohibition in the Koran of wine-drinking. As a beverage of an intoxicating nature called "arak" was unknown in the time of Mohammed, no provision on this point originally existed, but the jurists decided by reasoning from analogy that the drinking of that particular beverage should also be included among things prohibited.¹⁴ In like manner the contract of hiring and letting was entirely unknown, therefore, the great jurist, Abou Hanifé, introduced it as analogous to the contract of sale and purchase.¹⁵

⁸ D'Ohsson, *Tableau Général de l' Empire Ottoman*, Vol. I, p. 1. See also Savvas Pasha, *op. cit.*, pp. 28, 127, 128.

⁹ D'Ohsson, *op. cit.* Vol. I, p. 9. See also Siegnette, *Code de Khalif*, p. 20.

¹⁰ The actions or doings are known under the name of "Hadiss" or "Sunnet;" (this last word means literally the visible part of an object.) Savvas, *op. cit.*, p. 28.

¹¹ See D'Ohsson, *op. cit.*, p. 3.

¹² See Savvas Pasha, *op. cit.*, p. 43.

¹³ See D'Ohsson, *op. cit.*, p. 3.

¹⁴ Savvas Pasha, *op. cit.*, p. 42, also Savvas Pasha *Droit Musulman Expliqué*, p. 25.

¹⁵ Savvas Pasha, *Etude de Droit Musulman*, p. 111. Compare also Weil, *op. cit.*, Vol. II, p. 83.

When Mohammed appointed Moay Ibn Djebel to the governorship of Yemen with full powers of administration, he spoke to the governor as follows: "How," said the 'Prophet,' "will you try the cases brought before your court?" "By applying the law given by God," said Moay. "And if you do not find any provision in that law covering the matter?" "I shall be guided," was the answer, "by the action or conduct of his prophet." "And if that is not sufficient?" added Mohammed. "Then," answered the governor, "I shall make a legislative effort; i. e., I shall apply the law of analogy." The "Prophet" upon that thanked God for having given him men capable of serving the interests of the true religion who could properly render justice in the countries of the "faithful," Savvas, *Etude*, p. 43.

Such are the original bases upon which the Mohammedan jurisprudence is founded. But are these the only sources from which sprang the Islamic legislation? Or was it not formed or moulded into its actual shape through the influence of a foreign law? Was it not modified according to the necessities of the ever changing social condition of the people?¹⁶ In short, did the Mohammedan jurists of the early days of Islam in interpreting that part of the Koran dealing with legal matters, or the sayings and actions of their "Prophet," not borrow from the laws, written or customary, in force at the time in the Arabian peninsula, or the adjacent countries, such as Syria, Egypt and Palestine, which fell under their dominion during the first century of the Hegira; namely, less than a hundred years after the appearance of Mohammed as "Prophet?"

It is an historical fact that at the time of the Arabian conquest of these countries, the law in force there was that of the Greco-Roman empire.¹⁷ It is even probable that the Roman Law was not entirely unknown to the people of the commercial cities of Northern Arabia.¹⁸

According to the opinion of a distinguished orientalist, the Arabs of Arabia proper were acquainted with the Roman law, particularly through the Jews, whose laws were influenced through those of Rome, and even Mohammed was familiar with some Jewish writings; besides, Abdallah Ibn Abbas, a disciple of his, and one of the founders of the law of the "Tradition," which is one of the principal sources of Mohammedan legislation, was well acquainted with the Jewish literature.¹⁹

The Arabs, on account of their contact and relations with their

¹⁶ Mohammed himself said that the laws should be modified according to the exigencies of the time. Savvas Pasha, *Etude*, p. 41.

¹⁷ A. von Kremer, *op. cit.*, Vol. I, p. 534.

¹⁸ A. von Kremer, *op. cit.*, Vol. I, p. 534.

¹⁹ Kremer, *op. cit.*, Vol. I, p. 535.

The "tradition," as above explained, is the law formed from the actions of Mohammed.

subjects, adopted unconsciously the commercial law of the latter. A particular feature of the Mohammedan conquerors was that of allowing their non-Mussulman subjects to administer justice between themselves according to their national laws. But in the countries under the dominion of the Arabs, in mixed cases; namely, in litigations between Mohammedans and Christians, it was not the local law which was then the Roman, that was applied, but the Mohammedan.²⁰ Whilst in Rome, as is well known, in mixed cases; namely, between citizens and foreigners, it was the *jus gentium*, and not the *jus civile* or civil law that was applied.

As the barbarians after the conquest of Italy left the Roman law in full force amongst the conquered people of the peninsula, so the Arabs, after the conquest of Syria, and other places, and the Moors after that of Spain, left the local laws untouched, limiting only their applications to the subject races.²¹

During the reign of Moawia, the first Omejade Khaliph, when the seat of the empire was at Damascus in Syria, the Roman judicial system was not disturbed. The magistrates rendered the *formula* and the judge tried the case according to the instructions contained in the *formula*.²² This system lasted a whole century after the conquest.²³

In like manner, Mehmet II, the conqueror of Constantinople, following in the footsteps of the Arabian Khaliphs, permitted the Greeks, that fell under his sway, to regulate their legal matters, in certain cases, according to their laws and ancient customs and usages; and, even up to the present day, the Greek ecclesiastical courts in the Ottoman Empire, have exclusive jurisdiction over litigations concerning wills and testaments, marriage and divorce, alimony and the like, when the parties are of the Greek orthodox faith. The law applied in such cases is the Roman law of the Byzantine epoch.²⁴

²⁰ Kremer, op. cit., Vol. I, p. 535. In the year 741-744, A. D., for the first time, the Mohammedan law of inheritance was applied even to Christians, but the departure from the original system was not of long duration.

²¹ Fanniel, Histoire de la Gaule Meridionale, Vol. III, p. 52, quoted by Laurent, Histoire de Droit des Gens, Vol. V, p. 468. Also La Fuente, Historia de España, Vol. II, p. 135. Kremer, op. cit., Vol. I, pp. 534-535.

²² Savvas Pasha, Etude, p. 57.

²³ Savvas Pasha, op. cit., p. 95.

²⁴ (See Montreuil, Histoire du Droit Byzantin, Vol. III, pp. 501-502.)

There is, however, a tendency in recent times, on the part of the Turkish government, to encroach upon these privileges granted by the conqueror. Hence the constant friction between the Greek church and the Sultan's government, the one striving for their maintenance, the other for their abrogation. It is on account of this "tendency of encroachment" that in 1890 the Greek Patriarchate resorted to a unique measure; namely, to a "worship strike," by closing all the churches of the Greek faith in the Ottoman Empire, which compelled the Sultan to establish the *statu quo ante*.

It is also a well known fact that the study of the Roman law, as a legal science, did not cease after the Arabian conquest. Thus, during the sixth century A. D., there still existed in Beirut (Syria) and in Alexandria (Egypt) two famous Law Schools, which were left untouched for over a century after the Mohammedan conquest; the law taught in these schools, being the Greco-Roman, in force at the time, in these countries.²⁵ Two well known Mohammedan jurists, namely, Auzay and Shafei,²⁶ were natives of Syria and were well acquainted with the principles of Byzantine jurisprudence.²⁷

Judging from the great similarity existing between many parts of the Roman law and the Mussulman legislation, it may fairly be concluded, that the founders of the latter legal system, who flourished during the second and third centuries of the Mohammedan era, when already many provinces of the Byzantine Empire, were under the Arabian sway, borrowed, as much as was consistent with the Koran and the spirit of their religion,—from the laws, both written and customary, of Justinian and his successors, then in full force in that part of the Orient.

The Mussulman jurists, notwithstanding their strong attachment to the “law of God” expounded by Mohammed, did not scruple to adopt a foreign law, if they thought that it agreed with the principles of their religion,²⁸ the so-called Islamization of such law being an admitted theory amongst Mohammedan theocratic jurists.²⁹

It seems, that the first books on Mohammedan law were written during the reigns of the Abasside³⁰ Khaliphs, Ebou Dzafer and Mamoun, i. e., ninety years after the death of the four immediate successors of Mohammed³¹ and the founders of the two systems of Mussulman jurisprudence, namely, Abou Hanife³² and Malik,³³ wrote under the reign of Mamoun, between the years 80 and 179 of the Hegira (between 702 and 801 A. D.), during which epoch, no book, as yet, of Arabic learning existed.³⁴

²⁵ Kremer, *op. cit.*, Vol. I, pp. 533-534.

²⁶ Shafei is one of the four founders of the Islamic legislation.

²⁷ Kremer, *op. cit.*, Vol. I, p. 536.

²⁸ See Weil, *op. cit.*, Vol. II, p. 82.

²⁹ Savvas Pasha, *Etude*, p. 32.

The Turks adopted, nearly in their entirety, the commercial and criminal laws of France, and incorporated into their judicial system the procedure of that country in these branches of the law. They adopted in part also the French Civil procedure.

³⁰ The capital of the Abassides was in Bagdad, Mesopotamia.

³¹ See Savvas Pasha, *Etude*, pp. 58-59.

³² Abou Hanife was born in the eightieth year of the Hegira and died in the one hundred fiftieth (about 702-772, A. D.)

³³ Malik was born in the year 79 and died in that of 179 of the Hegira (about 701-801, A. D.)

³⁴ See Weil, *op. cit.*, Vol. II, p. 83.

But the Arabs, on account of their contact with foreign people, perceiving that the provisions of the Koran alone in legal matters, were not sufficient to meet their needs, developed their legislation, as above explained, by analogy and comparison.³⁵

It may therefore be presumed, that both these distinguished jurists, being familiar with the Roman law, either written or customary, and following the principle of "Islamization" of a foreign law, borrowed from it, in shaping and moulding the Islamic legislation.

It is beyond doubt, that before the time of Hanife, the Greco-Roman law was still in force in Syria,³⁶ and it was this "great"³⁷ Mohammedan jurist that first conceived the idea of creating a purely Mohammedan legal system.³⁸

But, we must not lose sight of the fact, that the Mohammedan "Universal Code" is a work of a later time, probably of an epoch during which Arabic learning was already shining in the East and some part of the West; namely, in Spain; after having previously come in touch both with Persian and Hellenic literature.

At a much earlier period, the famous medical college of the Nestorians³⁹ sent its graduates to the remotest parts of the Far East, spreading indirectly the Hellenic learning, as in the days of Catō and Cicero in Rome, the Greek doctors in Italy, had been in some way, the pioneers of Hellenic literature and philosophy.⁴⁰

It is claimed, that even Mohammed himself, whilst in Mecca, was in friendly intercourse with the physicians of the Greco-Nestorian School.⁴¹ That medical doctors, well versed in Hellenic literature, contributed to the diffusion of Greek learning, is proved by the fact that some Persians of that profession, attached to the court of the Abasside Khaliph, Mansour, in Bagdad, translated various Greek works by the order of the sovereign himself. Thus, Dr. Yahia,⁴² and his pupil, Dr. Honein,⁴³ translated the books on medicine of

³⁵ Weil, *op. cit.*, Vol. II, p. 83.

³⁶ Savvas Pasha, *Etude*, p. 95.

³⁷ Hanife is known amongst Mohammedans as the "great theologian" (Imami Azam.)

³⁸ Savvas Pasha, *Etude*, p. 129.

³⁹ See *La Grande Encyclopedia*, p. 976, *sub. verb.* Nestorius.

⁴⁰ See Mommsen, *Römische Geschichte* Ed., 1888, Vol. I, p. 63.

The graduates in medicine of the modern University of Athens, following in the footsteps of their ancient colleagues, become the heralds of Hellenic civilization in all the length and breadth of the Ottoman Empire.

⁴¹ Sedillôt, *Histoire des Arabes*, p. 334.

⁴² Dr. Yahia, besides giving an Arabic version of the works of Hippocrates, translated the books of Aristotle and those of other Greek writers. It is said, that he translated also Plato's *Timeus*.

⁴³ Dr. Honein was not behind his teacher, in his assiduity in putting into Arabic various Greek works. Thus, he translated a large part of the books of Hippocrates, of Galen, of Dioscorides, of Porphyrius, of Paulus Aegenites and many others. Weil, *op. cit.*, Vol. II, p. 283.

Hippocrates, the philosophical works of Aristotle and other scientific books of various Greek writers.⁴⁴ It is said that Honein used to receive as compensation for his labor, gold equal in weight to the Greek book translated into Arabic.⁴⁵ One of the Khaliphs was so much infatuated with Hellenic literature that he imposed on a Greek Emperor, as a tribute, Greek manuscripts, in lieu of gold.⁴⁶ The works of Greek philosophy were known by the Arabs through the numerous translations made, either by Greeks or Hellenists, such as Jews and Persians.⁴⁷ Greek manuscripts had been captured by the Arabs during their incursions into Asia Minor and Cyprus.⁴⁸

It was particularly, Mamoun, the Abasside Khaliph, who reigned in the beginning of the second century of the Hegira, 813 A. D. and surnamed the Arabian Augustus, that gave great impetus to the study of literature, of philosophy and science generally. Foreign literary men, such as Greeks, Persians and others were amongst his constant companions.⁴⁹

The works of Greek philosophy were studied by the religious sect of the Mutazilites, who did not believe in the divine origin of the Koran, and the dialectic of Aristotle was used in their dogmatic discussions.⁵⁰

It is, however, probable, that the Arabs received their first notions of Greek philosophy through the Persians⁵¹ who, at a much earlier epoch, were initiated into Hellenic philosophy, and science, in the then existing Academies of Edessa, the seat of learning of the Nestorians, and those of Nisides. The Persian King Chosroes, entertained in his court the Greek philosophers Damaskius, Cyrus, Eulavius and others, who fled to Persia, on account of persecution by the Emperor Justinian, which was due to their opinions on questions of religion.⁵² In like manner, at a much later date, namely, after the conquest of Constantinople by the Turks, many learned Greeks fled to Europe, and revived the study of Hellenic literature in the West.

It is a curious coincidence that the Hellenic literature was on two occasions made known to the world, through Oriental people. The

⁴⁴ Weil, *op. cit.*, Vol. II, pp. 281-283.

⁴⁵ Sedillot, p. 391.

⁴⁶ Laurent, *Histoire du Droit des Gens*, Vol. V, p. 460.

⁴⁷ Weil, *op. cit.*, Vol. II, p. 281.

⁴⁸ Weil, *op. cit.*, Vol. II, p. 281.

⁴⁹ Sedillot, *op. cit.*, p. 174.

⁵⁰ Weil, *op. cit.*, Vol. II, p. 282.

⁵¹ John the Patriarch of Antioch, in the beginning of the fifth century of the Christian era, translated into Persian, the works of Diodorus of Tarsus.

See Grande Encyclopedie, p. 976, *sub. verb.* "Nestorius."

⁵² See Weil, *op. cit.*, Vol. II, p. 84 and p. 281 note.

first time, the Arabs were acquainted with it, through the Persians, and the second, the European people were initiated into it, through the Moors in Spain. But the Arabian *renaissance*, unlike the European, was neither of long duration nor of so far reaching consequences.

From the above exposition of certain historical facts and the comparative study of the two systems of jurisprudence which will, hereafter, be made, it will be seen that there really exists, between them, an identity in more than one respect, and as a French jurist⁵³ well observed, this connection between the Roman law and the Mohammedan jurisprudence cannot be attributed to mere accident.

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[TO BE CONTINUED.]

⁵³ Seignette, Code de Khalif, p. 37.